UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRTIETH REGION

UNITED KISER SERVICES, LLC

and

CONSTRUCTION AND GENERAL LABORERS' UNION, LOCAL 1329

Case Nos. 30-CA-18129 30-CB-05352

and

NORTHERN WISCONSIN REGIONAL COUNCIL OF CARPENTERS

RESPONDENT UNION, CONSTRUCTION AND GENERAL LABORERS'
UNION, LOCAL 1329's RESPONSE TO GENERAL COUNSEL'S AND NORTHERN
WISCONSIN REGIONAL COUNCIL OF CARPENTERS' EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION

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INTRODUCTION

On December 31, 2008, Complaint No. 30-CB-5352 issued alleging that Construction and General Laborers' Union, Local 1329 ("Local 1329") engaged in unfair labor practices prohibited by the National Labor Relations Act, 29 U.S.C. §151, et seq. ("Act") Specifically, the Regional Director alleged that Local 1329 restrained and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act and that Local 1329 attempted to cause and caused United Kiser Services, LLC, a Michigan Limited Liability Company ("UKS") to discriminate against its employees. The Complaint claims that this conduct violated Sections 8(a)(3), 8(b)(1)(A) and 8(b)(2) of the Act. Local 1329 answered the complaint and filed Affirmative Defenses. The Complaint was consolidated with Case No. 30-CA-18129 for the purpose of conducting a joint hearing. On June 10 and 11, 2009, a hearing was conducted on both Complaints before Administrative Law Judge Bruce D. Rosenstein (sometimes "ALJ").

The facts involved here present an unfortunate situation. The UKS shop has operated since March 1, 2007 with millwrights and laborers working in a cooperative, harmonious and productive setting performing distinctly different types of work. The millwrights and laborers work in the same shop, described by all as a large and open facility consisting of three (3) bays and ancillary facilities. They work side-by-side, eat lunch together, socialize together and know about each others' union affiliation. The millwrights perform heavy welding requiring certification in connection with hydroelectric work. The laborers perform uncertified light welding and ancillary tasks relating to general marine work. When UKS secured the marine work, its millwrights told UKS that they did not want the work and that UKS should find someone else to do it.

The members of both unions worked side-by-side and got along in this manner for more than two years without complaint. No millwright in the UKS shop has complained to anyone about the fact that laborers are working in the shop. The evidence indicates that all employees have always been satisfied with the division of work.

At the hearing conducted before ALJ Rosenstein, it became clear that the case was uniquely based on the credibility of witnesses. The most important credibility questions related to the defense that UKS and Local 1329 raised regarding the timing of the charges. UKS and Local 1329 pled defenses pursuant to Section 10(b) of the Act. The parties focused on these defenses at trial. UKS and Local 1329 argued that the charging party had both actual and constructive notice of the conduct that it ultimately complained about well before the six (6) month period identified in Section 10(b) of the Act.

It is undisputed that all parties had a full and complete opportunity to present evidence and cross-examine adverse witnesses. Judge Rosenstein carefully considered all of the evidence presented and evaluated the credibility and bias of all witnesses. On August 28, 2009, Judge Rosenstein entered a Decision finding that the Unfair Labor Practice charge challenging UKS' recognition of Local 1329 as the bargaining representative of certain shop employees performing production work at UKS' plant located in Norway, Michigan was untimely and that UKS did not unlawfully refuse to bargain with the Carpenters.

The General Counsel ("General Counsel") and the Northern Wisconsin Regional Council of Carpenters ("Carpenters") except certain findings of the ALJ in his August 28, 2009 Decision. Local 1329 will deal in its Response only with the issue relating to the charge filed against it.

A review of the materials provided demonstrates that the exceptions filed by General Counsel and the Carpenters are not supported. Rather, the record demonstrates that key credibility issues were resolved against the General Counsel and the Carpenters. The exceptions filed here seek little more than a chance to re-argue the credibility matters which have been decided based on full and complete evidence.

It is equally clear that many of the exceptions mischaracterize the legal positions presented below. For example, one aspect of this case concerns the Carpenters' challenge to UKS' recognition of Local 1329 as the representative of certain UKS shop employees hired after January 1, 2007. The record contains no evidence whatsoever substantiating the Carpenters' claim to the work at issue, a claim that is

incredibly supported by the General Counsel. The General Counsel's claim that the Voluntary Recognition Agreement attached to the Carpenters Field Agreement grants 9(a) to shop employees located in Michigan is indefensible since the Voluntary Recognition Agreement, by its own terms, is limited to work performed in the specific geographic jurisdictions of Wisconsin and Menomonee, Michigan. It is undisputed that the UKS shop is located in Dickinson County, Michigan (outside of the geographic reach of the Field Agreement and the Voluntary Recognition Agreement). Likewise, the General Counsel's argument that the Carpenter's Shop Agreement grants 9(a) status to the Carpenters is equally flawed since no contract language even remotely establishes a "clear," "unequivocal" acknowledgement of such status, as universally required by Board precedent. Accordingly, such arguments should be disregarded in their entirety.

More importantly, the ALJ's decision does not reach the merits of the Carpenters' representation claim because the ALJ properly concluded based upon clear and convincing testimony in the record that the unfair labor practice charge was untimely because it was filed more than one year after UKS recognized the laborers as the representative of shop production employees. The ALJ properly found that the Carpenters had both actual and constructive knowledge of the laborers' performance of shop work (over which the Carpenters now claim exclusive jurisdiction) more than six (6) months prior to the filing of any charge. Accordingly, the Complaint is clearly barred by the statute of limitations contained in Section 10(b) of the Act and was properly dismissed by the ALJ.

It is equally clear that the exceptions of the General Counsel and the Carpenters are contradicted by the testimony of the Carpenters' Business Agent Greg Dhein and Union Steward Mike Manowski. The record is replete with evidence that the Carpenters' knew, or with reasonable diligence should have known, that the laborers were performing shop production work a full year before any charge was filed. In fact, Union Steward Manowski testified, on direct examination, that he observed laborers performing shop production work in the Spring of 2007. The Carpenters later claimed jurisdiction over the work. But the Manowski testimony on this issue showed what everyone knew: the Carpenters' were aware of

the presence and work of the laborers beginning in 2007, everyone in the shop, including the Steward and every other carpenter was happy with the manner in which the work was performed and nobody saw a problem until much later. This tardy complaint is not supported by any justification in the record. It is for this reason that the 10(b) limitation applies.

Equally important is a fact that General Counsel and the Carpenters choose to ignore: the Carpenters in the shop refused to do the work assigned to the laborers. Steward Manowski did not complain and neither did Business Agent Dhein where their members not only did not want to perform the work – they flatly refused to perform it. Any argument to the contrary is unsupported by the record and disingenuous.

As a result, General Counsel and the Carpenters are left to mischaracterize the evidence, obfuscate its meaning and impermissibly modify their positions regarding the issues in the case. Despite their best efforts, they cannot avoid the dire impact of witness testimony which is directly on point on the crucial issues. More important, they cannot argue around the specific findings made by the ALJ which are based in significant part on credibility and common sense.

For example, the attempts of General Counsel and the Carpenters to minimize the impact of Steward Manowski's testimony fail on every level. General Counsel's argument that Manowski was no longer the Carpenters' steward at a time relevant to the case is contradicted by both Manowski and Dhein. Manowski testified that while he did not really want to be the Steward, he nonetheless held himself out as the Steward to UKS in 2006 and never resigned his position. UKS' representative testified, without contradiction, that Manowski identified himself to management as the steward from the inception of UKS. For his part, Dhein testified that Manowski was his steward and that he expected Manowski would report performance of millwright work by non-millwrights, but that Manowski was "derelict" in this duty. In sum, Manowski's "derelict" performance as steward does not, by itself, relieve him of his authority and rights as steward, nor can the Carpenters relieve itself of its obligations to police the contract simply because its steward was not doing the job.

It is unfortunate that General Counsel and the Carpenters have mischaracterized the role of a Steward who was placed in a difficult position in testifying in this case, but did the best he could to tell the truth. The ALJ saw this, appreciated Manowski's predicament, and made correct findings of fact based on all of the circumstances. These findings led to a recommendation of dismissal based on the 10(b) defense.

It is clear that there is no allegation of concealment in this case. To the contrary, the record shows that a full complement of laborers was in plain view by mid-year 2007, a workforce that, in fact, significantly outnumbered the shop carpenters. It is only reasonable that the Carpenters could, by "mere observation" and presence at the worksite, discern the facts supporting their fatuous charge much earlier. The arguments of the General Counsel and the Carpenters that the laborers' presence was not an obvious red flag are a misplaced distortion of the record. Most compelling on this point was Dhein's own testimony concerning his belated discovery of the laborers. When asked how he learned of the alleged breach, Dhein testified that when he arrived onsite (after several months' absence) he saw that "the shop was pretty full." This led Dhein to angrily question Manowski about the situation, and ultimately to the charge at issue in this case.

Certainly, had Dhein been diligent in his policing of the contract, he would have easily discovered the facts underlying the charge much earlier. But, the record shows that Dhein was not at all diligent, choosing to visit the site only a couple times per year and apparently never concerning himself with what actually occurred in the shop. In contrast, the Laborers' Business Representative is on site at least once per week, often two times, and has established a long-term, committed relationship as a bargaining representative of the unit employees. Certainly, had Dhein had any regular presence in the shop, he would have noticed not only the sizeable contingent of laborers doing production work, but also would likely have seen a competing Business Agent. Dhein's failure to do so, like Manowski's alleged "dereliction of duty" does nothing to toll the 10(b) limitations period. Accordingly, the

exceptions of the General Counsel and the Carpenters should be disregarded and the decision of the ALJ adopted by the Board.

For all these reasons, Local 1329 requests that, based upon substantial record evidence, the Board affirm and adopt the ALJ's findings and conclusions as its own.

STATEMENT OF UNDISPUTED FACTS

Local 1329 recognizes the Stipulated Factual Findings that the parties submitted in this matter and incorporates the facts set forth there in their entirety. (Jt. Exhibit 1) The evidence demonstrates that UKS and its predecessors have operated for many years using a number of different business models with varying degrees of success. The entities always employed persons affiliated with various construction trades, including millwrights and laborers. Historically, these trades worked primarily in the field, repairing hydroelectric equipment (sometimes "Hydro Work"). In the years leading up to 2006, work was performed in the UKS shop by millwrights, laborers and electricians.

The most important events here began in 2006. At that time, after some changes in ownership, structure and business direction, a former business model which had proven to be successful was reestablished and UKS began to prosper by performing composite crew Hydro Work.

However, as noted above, this was not the first work performed in the shop pursuant to a collective bargaining agreement. Going back at least to 1995, laborers and others periodically worked in the shop under the terms of the current Laborers' Field Agreement. This practice included the work of persons doing all non-millwright work. (Jt. Exhibit 5) Millwrights worked under a Field Agreement. (Jt. Exhibit 3)

The Hydro Work included increasingly greater amounts of work in the UKS shop. Apparently some of the UKS millwrights wanted to work primarily in the UKS shop, rather than in the field. During this time, the shop has always been located in Norway, Michigan, in Dickinson County.

With full time shop work available for millwrights, as part of expanding the UKS Hydro Work, UKS and representatives of the millwrights' agent met in 2006 and signed a Shop Agreement. (Jt.

Exhibit 4) It appears that this Agreement was signed based on informal discussions. For example, the millwrights made no showing of majority status in the shop at that time and have not done so since. The geographic jurisdiction of the Millwrights Shop Agreement, as well as the Field Agreement, does not cover Norway, Michigan. Rather, the Agreements covered certain areas of Wisconsin and a portion of Florence and Marinette counties in Michigan. (Jt. Exhibit 3, p. 36) The Millwrights Shop Agreement does not mention Norway or Dickinson County, Michigan, where the UKS shop is located.

In late 2006 and early 2007, a number of things changed significantly at the UKS shop. The company hired Joe Spinnato to run its shop. Mr. Spinnato secured a new and different type of work: production welding and related production services on marine equipment ("Marine Work"). This work has grown, and now includes grinding, sandblasting and painting.

Greg Dhein testified that he was employed by the North Central States Regional Council of Carpenters as a Business Agent/Organizer. (R. 126) ("R" indicates the page reference to the transcripts of June 10 and 11.) Dhein testified that he had been the agent assigned to service the UKS shop for eight and one-half years. (R. 127) Between the dates of January 1, 2006 and July of 2008 he visited the UKS shop "eight times." (R. 128) In a typical visit, he would "go down into the shop area and visit the guys." (R. 128) He went on to testify that he would "normally" but "not always" visit the shop employees. (R. 129)

Dhein appointed Mr. Manowski as the steward in 2001 or 2002. (R. 251, lines 2-3) When asked if Mr. Manowski's duties would include reporting the fact that someone other than a millwright was performing bargaining unit work in the shop, he answered, "Yes. Yes." (R. 251, lines 20-23; 252, lines 12-17) He testified that Mr. Manowski has "no qualifier or reduced steward duties." (R. 250, lines 18-20)

Dhein testified that his duties included monitoring the UKS shop in the same manner that he monitored every other shop in the area he covered. (R. 252, lines 20-23) In order to fulfill his duty, he appointed Mr. Manowski as a Steward. (R. 252, lines 24-25) The following exchange occurred:

Q: And you would rely on him to report to you things such as people doing your work who are not your members, correct?

A: You would think so, yes.

Q: Well that is the system that you have put in place, correct?

A: Yes, sir.

Q: That is the system you rely upon, correct?

A: Yes.

(R. 253, lines 3-10)

Joseph Spinnato, Jr., is the Shop Manager for UKS. (R. 284) He provided key testimony regarding the change in work performed in the shop and the manner in which UKS chose to staff the work.

Spinnato was hired by UKS in July of 2006. (R. 285) At that time, UKS did "hydroelectric repair/refurbishing. Specialized work. (R. 285) UKS used 4-5 millwrights and one laborer. (R. 285) Since that time, there have been "extreme changes" in the work that UKS performs. (R. 288)

Spinnato testified that UKS has "taken on production machining, production fabrication, production welding." (R. 288) The UKS hydroelectric work has also changed significantly. Previously, UKS did only repair and refurbishment and made "like-in-kind" equipment. (R. 289) This work consists of "making an exact duplicate copy." (R. 289) He also described it as making a "carbon copy of the existing component." (R. 289)

UKS has tripled its production of runners by performing new work in the form of engineering and re-engineering these items. (R. 289)

Millwrights and laborers do different work. Spinnato testified that the millwrights perform the "specialized work" and the laborers perform the "production-oriented work." (R. 290)

Since Spinnato was hired, UKS has installed a paint room. Before that time, any painting beyond "touch up" type work was "jobbed out." (R. 292) UKS has also started to do CNC

programming. Previously, that work was also "jobbed out." (R. 292-93) UKS has also installed a tool room. (R. 293)

Spinnato described the difference between fabrication welding and production welding. Welding done in connection with Hydro Work is "heavy fabrication." A different type of skill is used in this heavier welding. (R. 294) Production welding is different. The work in performed on "barge paddles" and the material is thin. The welders are "on their knees all day." (R. 294)

The more specialized welding work is the heavy fabrication that millwrights perform. (R. 294) Millwrights must be certified to do this welding. (R. 295) Millwrights are trained to perform overhead rigging. (R. 297)

From the time Spinnato was hired in 2006 until mid-2007, the workforce increased to "around 15" and continues to grow to this day because of the "extra work we've added to the shop." (R. 301) The painting, CNC, tool crib and production welding work is new. (R. 301)

Much of the new work is performed for Marinette Marine, Superior Welding and Global Machining. The new work was generated by Spinnato's contacts. (R. 303)

Spinnato first met Joe Gallino in early 2007. UKS contacted him and asked him to come to the shop to talk about laborers. (R. 309) Since that time, Spinnato has been in touch with Gallino on at least a weekly basis. (R. 309) The Laborers' Hall is three (3) miles from the shop and the Millwright's Hall or office is 164 miles away. (R. 310)

Spinnato testified that he was arranging to do the work for Marinette Marine. The work consisted of work on barge paddles. Spinnato wanted to set up a workforce to do the work. (R. 311) UKS did the first "two or three" orders and the millwrights "weren't interested in the work." (R. 311) The jobs required the workers to be on their knees for 8-10 hours a day welding and grinding. Spinnato did not expect the millwrights to do this work and the millwrights were not interested in doing the work. (R. 311) The UKS millwrights "kept asking" Spinnato to hire someone else to do the work. (R. 378) They "did not want the work" and said "it is not millwright work." (R. 379)

Spinnato recalled that he "got the marine work" in December of 2006 and talked with Joe Gallino "probably" in January of 2007. The agreement with the laborers was in place by March 1, 2007. It took effect when signed. (R. 312)

In October of 2006, Spinnato met with Greg Dhein. In part, Spinnato told Dhein that UKS was trying to secure additional jobs. (R. 324) Spinnato said that he was interested in finding persons to do production work. Dhein said that he would look into it. Spinnato never heard from Dhein about this subject. (R. 325)

Spinnato testified that millwrights and laborers worked in each other's presence on a daily basis. (R. 358) The shop is a "big, open" space. (R. 360) On November 10, 2008, Local 1329 provided UKS with signed authorization cards from eight (8) of the nine (9) laborers working in the shop. These employees perform Marine Work. The remaining four (4) employees are millwrights who perform Hydro Work. This is not and has never been millwrights' work. The millwrights in the UKS shop have never asked to do the work or otherwise shown any interest in the work.

As the Marine Work grew, Joe Gallino, Field Representative for Local 1329, asked UKS to consider a Shop Agreement for the work. Mr. Gallino made it clear that he did not wish to interfere with the work performed by the millwrights. Rather, he wanted only to secure the Marine Work. UKS took the position that it would talk with Local 1329 about a Shop Agreement only if its employees were interested. It turned out that the employees who were performing Marine Work were interested.

In early 2007, UKS entered into a Shop Agreement with Local 1329 for Marine Work. (Exhibit 6) Neither UKS or Local 1329 ever sought to interfere with the millwrights' Hydro Work and they never did so. The Local 1329 Shop Agreement was signed because the UKS employees who performed Marine Work, not Hydro Work, wanted to be represented by Local 1329. The Local 1329 Field Agreement and the UKS Shop Agreement specifically cover the geographic jurisdiction that includes Dickinson County; and, therefore, Norway, Michigan.

Joseph ("Joey") Gallino testified that he was the Secretary-Treasurer and "field rep." for Local 1329. (R. 398) Local 1329 covers Dickinson County. (R. 398)

In the early portion of 2007, Gallino met with UKS to discuss a shop agreement. (R. 399) Since the agreement was signed, he has visited the shop once, twice or three times a week. The shop agreement was signed on March 1, 2007. Prior to that time, he saw laborers working in the UKS shop. He talked with these laborers as part of his duties. (R. 400)

Gallino has always been able to tell who the laborers and millwrights are in the UKS shop. (R. 400) He never had trouble observing the entire shop once inside. (R. 401-02) He could always see millwrights working there. He testified that it was "very, very easy to know who they were." (R. 402)

When UKS contacted Gallino in order to discuss a shop agreement, the company said they were "expanding their shop and going after a new line of work." (R. 402) From that time forward, Gallino did not intend to have laborers replace millwrights in the shop.

Local 1329 heard no complaint about the status of operations in the UKS shop. Joe Gallino visited the shop on a regular basis and met the millwrights who worked there.

Sometime in 2008, a millwright agent voiced concern about the fact that laborers were working in the UKS Shop. This concern came some seventeen (17) or eighteen (18) months after members of Local 1329 began doing the Marine Work. During this time, all of the millwrights in the UKS Shop knew of the division of labor between Hydro and Marine Work. During the interim period, a millwright steward was assigned to the shop, and he voiced no concern or complaint about the assignment and performance of the Marine Work. Joe Gallino met the steward on a number of occasions.

A related case began when the millwrights filed a charge against UKS on August 22, 2008. The present charge was filed on October 27, 2008.

Mike Manowski has been employed by UKS since January 1, 2006. (R. 77) He worked for predecessors for 10 years. (R. 77)

Manowski testified that UKS had "about 20" shop employees, and six of these employees are millwrights. (R. 83) The other shop employees are laborers. (R. 83) He recalled that laborers began working in the shop in about June of 2007. (R. 85)

Manowski testified that Greg Dhein visited the UKS shop "[o]nce in a while." (R. 87) When Dhein would visit, he would "usually" talk with the millwright employees. (R. 88

Manowski testified that Greg Dhein appointed him as steward in the shop "[a]fter 9/11 when the planes hit." (R. 94) The appointment was done orally and Dhein told him that if any employees had "any problems" they should get in touch with Manowski and Manowski should call Dhein. (R. 95) Manowski testified that he remained the steward until 2003. (R. 80) He did not tell anyone at that time that he no longer wanted to be the steward. (R. 96)

Manowski testified that he did not personally see Dhein come to the UKS facility between the dates of January 1, 2006 and July of 2008. (R. 100)

Manowski testified that he talked with laborers about things like pension and vacation benefits for the respective trades "about a year ago." (R. 101) He eats lunch with laborers and socializes with laborers. (R. 101-102)

Manowski testified that the "work locations of the laborers [are] clearly visible to the work locations of the millwrights. (R. 109)

Manowski later testified that it was his recollection that Greg Dhein visited the shop "a couple of times" in 2007. (R. 114) This started in 2007. (R. 124) He testified to this fact because it was "true." (R. 114) Manowski admitted that he was confused about the visits.

Manowski testified that he knew that laborers and millwrights worked "side by side" in the shop.

(R. 122) Manowski knew that the groups were paid different wages and benefits. (R. 123)

STANDARD OF REVIEW

The relevant standard of review provides that the Board shall not overrule an administrative law judge's credibility resolutions unless the "clear preponderance of all the relevant evidence" convinces the

Board that the ALJ was incorrect. Goski Trucking Corp., 325 NLRB 1032, 1032 (1998), citing Standard Dry Wall Products, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3rd Cir. 1951). Upon careful examination, the Board will find that, in the present case, the ALJ's conclusions and findings are fully supported by the record.

ARGUMENT

I. THE ALJ CORRECTLY DETERMINED THAT THE UNFAIR LABOR PRACTICE CHARGE CHALLENGING UNITED KISER'S RECOGNITION OF THE LOCAL 1329 AS THE REPRESENTATIVE OF SHOP PRODUCTION EMPLOYEES WAS UNTIMELY.

The key findings that the ALJ made regarding the ULP filed by the Carpenter were based on clear evidence and credibility determinations. General Counsel and the Carpenters take exception with all of the ALJ's findings concerning the Carpenters' receipt of notice (actual and constructive) of the facts giving rise to the charge in this case. (GC Brief at 18-41; Carp. Brief at 10-23.) However, both General Counsel and the Carpenters misstate the notice requirement. It is undisputed that "the sixmonth limitations period prescribed by Section 10(b) begins to run when a party has clear and unequivocal notice of a violation of the Act" and that "the requisite notice may be actual or constructive." CAB Assoc., 340 NLRB No. 171, Slip Op. at 2 (2003) (internal citation omitted). Further, "[i]n determining whether a party was on constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence." Id.

However, both General Counsel and the Carpenters argue that the 10(b) period does not begin to run until the Carpenters had knowledge of Local 1329's collective bargaining agreement with UKS, and the 9(a) terms of the agreement. (GC Brief at 18-19; Carp. Brief at 16-17.) The argument is incorrect. In this case, the Complaint alleges that the Carpenters is the exclusive bargaining representative of "all machinists and fabricators working in the shop." (Complaint ¶ 6.) The Complaint further alleges that on March 1, 2007 UKS violated the Act by granting recognition to the laborers for performance of such work in the shop. (Complaint ¶ 8.)

Board precedent clearly states that the 10(b) limitations period begins to run when a party receives notice – either actual or constructive – "of the acts that constitute the alleged unfair labor practice, i.e., until the aggrieved party knows or should know that his statutory rights have been violated." Morrell & Co., 304 NLRB 896, 899 (1991). Accordingly, the relevant question is: at what point did the Carpenters acquire knowledge of "facts from which it should have known" that an unfair labor practice was committed. Id. (finding union had clear and unequivocal notice outside the 10(b) period of "facts from which it should have known that Morrell had closed and reopened its Ark City plant…") In the present case, the Carpenters' claim a right of exclusive representation of all shop employees performing machining or fabrication work. Therefore, observation of other non-Carpenter shop employees performing such functions would certainly impart knowledge of the relevant facts from which the Carpenters should have known of the alleged violation. To hold otherwise would be a perverse elevation of form over substance.

Because the record shows that the Carpenters had clear and unequivocal notice, both actual and constructive, of the facts that form the basis of the Complaint outside the six-month limitation period, the ALJ's findings and decision should be affirmed and adopted by the Board.

A. The Evidence in the Record is that the Carpenters Had Both Actual And Constructive Knowledge That Laborers Were Doing Fabrication Work In The Shop Before February 21, 2008.

Section 10(b) of the Act requires that unfair labor practice charges challenging representation be filed within six months of the date the aggrieved party received notice. Because the Carpenters' unfair labor practice charge was first filed on August 21, 2008, the relevant inquiry is whether or not the Carpenters had actual or constructive knowledge of the facts giving rise to the charge on or before February 21, 2008. (Jt. Ex. 1, ¶ 29.) The record shows that UKS easily satisfied its burden to prove that the Carpenters had such knowledge prior to February, 2008.

The timeline of events is crucial. First, the record shows that UKS expanded operations in 2007 to include a new type of business: marine industry shop work. (Tr. at 288-289, 293-303.) Between

January 1, 2007 and March 18, 2008, ten (10) laborers were hired to work in the shop due to expanding business generated by Shop Superintendent Joe Spinnato. (R. Ex. 2; Tr. at 266, 287-288.) As General Counsel and the Carpenters' concede, UKS recognized the laborers as the representative of the newly hired shop employees in <u>March</u>, 2007. (Complaint ¶ 8.)

Despite this, the Carpenters failed to voice any objection to the laborers' performance of such work until July, 2008. (GC Ex. 4.) During the long period of silence on the subject, the Laborers' Union established a strong presence in the shop, with a workforce much larger than the millwrights and a Business Agent active in the shop, visiting on average once per week. (Tr. at 399-400; R. Ex. 2.) Under these circumstances, labor policy strongly favors continuing the laborers' well-established relationship. St. Barnabas Med. Center, 343 NLRB 1125, 1128-1129 (2004) (Noting that tolling the limitations period because union claimed ignorance "is inconsistent with the policies underlying Section 10(b), which is intended 'to promote...stable collective-bargaining relationships by precluding extended periods of uncertainty regarding the validity of the agreement and the parties' contractual obligations.""), quoting A&L Underground, 302 NLRB 467, 469 (1991).

More importantly, the record amply supports the ALJ's finding that the Carpenters had both actual and constructive knowledge of the relevant facts before February, 2008.

B. Greg Dhein Knew Or Should Have Known Before February of 2008 That United Kiser Employed Non-Carpenters To Do Fabrication Work In The UKS Shop.

The ALJ properly concluded that, with reasonable diligence to police the contract, the Carpenters' Business Agent Gregory Dhein should have realized the operative facts giving rise to the unfair labor practice charge in this case. (ALJ Dec. p. 6-8.) Dhein has served as the Carpenters' Business Representative serving UKS' employees since the Company's inception on January 1, 2006. (Tr. at 126, 127.) Prior to that, Dhein served as the Carpenters' Business Representative for predecessors of UKS from November, 2000 to 2006. (Tr. at 127, 249.) Dhein testified that, on average, four to six Carpenters currently work in the UKS shop. (Tr. at 128, 191.) All of the Carpenters in the

UKS shop perform hydroelectric work. (Tr. at 234.) Prior to 2007, virtually all of the work at UKS was hydroelectric repair work. (Tr. at 234.)

Significantly, however, Dhein admits that laborers have always been present in the UKS shop. (Tr. at 224-225.) In fact, Dhein testified that in 2006, he solicited two shop laborers to join his union. (224-225; 233.) Dhein testified explicitly that he was aware laborers were working in the UKS shop as early as 2006:

- Q. [Y]ou were fully aware from January 1 forward that there were Laborers union members working in the shop at United Kiser, is that correct?
- A. Okay.

(Tr. 232.) Dhein further clarified, upon questioning from the ALJ:

- Q. [D]id you know that there were Laborers at United Kiser based on your visits to the facility in 2006?
- A. Yes.

(Tr. at 233.)

Clearly, Dhein was well aware that UKS was a competitive two-union shop for years before the Complaint in this case.

Moreover, on October 25, 2006, UKS informed Dhein specifically that the Company was seeking new shop work "specifically in the marine industry" and that there would be additional "production work" in the future. (Tr. at 323-325.) Spinnato testified, without contradiction, that Dhein agreed to look into classifications to do the new work, but Dhein never got back to Spinnato. (Tr. at 325.)

Despite being told that UKS would be expanding its shop business significantly and despite knowing that a competing union had workers on site, Dhein made no real effort to police or monitor his union's alleged status as the exclusive representative of shop employees. Indeed, Dhein testified that he visited the shop only twice in the relevant period: on July 23, 2007 and January 11, 2008. (Tr. at 148-150, 153-154, GC Exs. 33-34.) By the time of Dhein's visits, a sizeable number of laborers had been

hired to perform the marine industry production work at UKS. (Tr. at 300-301; R. Ex. 2.) Despite this, Dhein claims to have simply not noticed this substantial increase in the shop workforce, and the General Counsel argues that Dhein's inattentiveness justifies tolling of the 10(b) period. It does not. Dhein certainly should have been able to infer, based upon the employer's statement that it was seeking substantial new work combined with the presence of a much larger workforce in a dual-union shop, that perhaps his union's claim to exclusive jurisdiction over such work was not being honored.

It is well settled that ignorance on the part of union agents does not toll the 10(b) statute of limitations. John Morrell & Co., 304 NLRB 896 (1991) ("[following] Morrell's reopening of Ark City, the union should have been able to infer Morrell's unlawful scheme. That it did not, in fact, making the connection does not toll the running of the 10(b) period."). As the Board aptly noted in Moeller Bros. Body Shop, 306 NLRB 191, 193 (1992):

While a union is not required to [] police its contracts aggressively in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or a unit...and then rely on its ignorance of events occurring at the shop to argue that it was not on notice...

1. Based upon "mere observation" Dhein could have learned of the alleged violation.

In this case, "mere observation" and any degree of attentiveness during his visits in 2007 and 2008 would have put Dhein on notice of the alleged violation in this case. General Counsel and the Carpenters go to extraordinary lengths to argue that the "mere presence" of laborers performing such work is "insufficient" to place the union on notice that its alleged right to exclusively represent shop employees was violated. (GC Brief at 37-39; Carp. Brief at 20-23.) Yet Dhein's testimony refutes such arguments. Dhein testified the presence of the large number of workers in the shop was precisely what put him on notice in 2008 that something was amiss. Dhein testified:

- Q. [W]hen did you first learn that there were Laborers performing work in the United Kiser shop?
- A. On-- when we began the shop negotiations for the addendum in June of 2008.
- Q. And how did you find out about it?

A. I walked into the shop and it was pretty full.

(Tr. at 179.)

Likewise, on direct exam from his own counsel, Dhein testified:

- Q. In June of 2008 when you went down to United Kiser shop what did you see?
- A. Shop full of workers.
- Q. Approximately how many do you remember seeing?
- A. Probably 20 people altogether.
- Q. Were you able to see the faces of all 20 people?
- A. No.
- Q. You testified that there were normally four to six shop employees in the shop?
- A. Yes.

(Tr. at 191.)

Dhein further testified (on direct examination):

- Q. Did you talk to the Carpenters employees after you saw these twenty people in the shop?
- A. The shop millwrights?
- Q. Right.
- A. Yes.
- Q. Who did you talk to?
- A. Mike Manowski.
- Q. What do you remember being said during that conversation?
- A. I asked him who everybody was in the shop there.
- Q. And what did he say?
- A. He said they were Laborers. (Tr. at 196-197.)

Mere weeks later, July 18, 2008, the Carpenters demanded that UKS recognize it as the exclusive representative of shop employees and repudiate recognition of the laborers. (GC Ex. 4.) The Carpenters' demand was clearly based upon Dhein's "mere observation" of a shop full of workers who were not carpenters, which indisputably prompted his conversation with Manowski wherein Dhein learned that the employees were laborers. Accordingly, excepting parties' arguments that the "mere presence" of the laborers working in the shop did not constitute notice must be disregarded and the ALJ's findings affirmed.

The fact that Dhein discovered the alleged violation through "mere observation" of workers on the shop floor, followed by a brief conversation with Steward Manowski shows that had Dhein engaged in due diligence earlier (such as at the January 2008 meeting with UKS, which Dhein claims was for the purpose of "signing up" two field workers who were performing millwright work that Dhein claims had been hidden from him (Tr. at 154-155)) he certainly would have discovered the laborers performing production work. It is well settled that Dhein, as the Carpenters' long-time Business Representative, had a duty to police the terms of the contract, which would include the alleged 9(a) representation terms. Earthgrains Co. (Sara Lee Bakery Group, Inc.), 349 NLRB 389, 395 (2007) (noting request for information concerning third party was logically a connection to "[the union's] duty to police that portion of the collective bargaining agreement that prohibits the Company from entering into agreements that are inconsistent with its labor contract."); New York Printing Pressmen & Offset Workers Union, No. 51 et al. v. NLRB (2nd Cir. 1978) (finding that the union's failure to appear in the plant for period of seven to nine months showed lack of due diligence, stating "[O]f particular note is the failure of the union during this period to make any effort to police the union security provision of the collective bargaining agreements.") (citations omitted).

The ALJ correctly found that Dhein was derelict in his duty to police the agreement, and should have discovered the alleged violation much earlier. Dhein's dereliction of his duties does not toll the 10(b) limitations period, and UKS has more than met its burden to prove that the Charge was untimely.

The exceptions of the General Counsel and the Carpenters should be disregarded and the ALJ's decision affirmed.

2. The ALI did not shift the burden of proof to the General Counsel.

In yet another attempt to confuse the issues in this case and avoid the impact of the unambiguous record, General Counsel and the Carpenters argue that the ALJ's decision must be overturned because he allegedly shifted the burden of proof on the 10(b) defense to the General Counsel. (GC Brief at 19; Carp. Brief at 9, 11-12, citing ALJ Decision p. 7, lines 7-15.) Again, the excepting parties' arguments are unsupported. The ALJ's statement that "the General Counsel did not conclusively establish the underpinnings of this argument" concerns the ALJ's assessment of record evidence of Dhein's alleged due diligence and the lack of persuasiveness of the General Counsel's argument on this point, given that Dhein visited the shop floor on only one occasion (a Friday) from January, 2007 to June, 2008. The statement does not reflect any unlawful burden-shifting, but rather states the ALJ's assessment that the evidence presented did not evince "due diligence" on Dhein's part. The record clearly shows that the General Counsel introduced evidence concerning Dhein's site visits and contacts for the sole purpose of refuting UKS' argument that Dhein failed to exercise due diligence. (GC Exs. 32-25; Tr. at 141, 151.) The ALJ's explanation for his rejection of General Counsel's argument is not evidence that the burden was unlawfully placed upon the General Counsel. Accordingly, the ALJ's decision should be affirmed.

- C. Union Steward Manowski Knew Or Should Have Known Of The Facts Supporting The Alleged Violation Prior To February, 2008.
- 1. The ALJ properly found that Manowski was, at all relevant times, the Carpenters' Steward.

The General Counsel's and the Carpenters' claims that Manowski was not a Union Steward in 2007-2008 are incorrect. Both Manowski and Dhein testified that Manowski was the Union Steward during the relevant time period. Manowski testified under questioning by the ALJ:

Q. Who originally appointed you as steward?

- A. Greg Dhein.
- Q. And do you recall when he appointed you as steward?
- A. After 9/11 when the planes hit.

(Tr. at 94.) Manowski further testified:

- Q. Did you have any discussions with Mr. Dhein at that time as to what your responsibilities were as steward?
- A. Not really.
- Q. Well, did he tell you when he was appointing you the steward?
- A. Just, you know, if anybody has any problems and, you know, if they get a hold of me I'd get a hold of him.

(Tr. at 95.) Although Manowski testified that he intended to resign, he also clarified that he never actually informed anyone of his alleged resignation as steward:

- Q. [D]id you inform anybody at the employer that you were no longer the steward?
- A. No. I'm not sure if they even knew.
- Q. Did you inform Mr. Dhein that you were no longer wanting to be the steward at the facility?
- A. No.
- Q. Did you at any time ever inform after 2003 Mr. Dhein that you no longer wanted to be the steward at the plant?
- A. No.

(Tr. at 96.)

Additionally, Spinnato's unrefuted testimony shows that when he came on board in 2006, Manowski presented himself to Spinnato as the steward. Spinnato testified:

- Q. When you started with United Kiser, did anyone tell you that there was a steward for the millwrights?
- A. Yes.
- Q. Who told you that?

- A. Mike Manowski did.
- Q. And do you recall when he said that?
- A. The date? No. But it would have been within probably the well, it would have been within the first month I worked there.
- Q. Do you recall what the occasion was for him to tell you he was shop steward?
- A. I was just down talking to the guys on the shop floor. And I'm not familiar with the Millwright Union. We were you they were just talking to me about the union, and Mike said that well, we were talking, you know, talking about steward, and I said "Well, whose the steward here?" And Mike said the way he said it was "I guess I am."
- Q. Did anyone ever tell you otherwise, that anyone else was the steward?
- A. No.
- Q. Did Mike ever tell you he had resigned or was no longer the steward?
- A. No.

(Tr. at 327.)

Most importantly, Dhein believed that Manowski was his steward. Dhein testified:

- Q. Mr. Manowski was appointed as a steward by you, correct?
- A. Yes.
- Q. And he remains the steward until today, correct?
- A. Yes.

٠..

- Q. [Y]ou gave a statement to an investigator in this case, you indicated 'I have a steward in the shop and his name is Mike Manowski,' correct?
- A. Yes, sir.
- Q. And you said that in September, 2008, correct?
- A. Yes, sir.
- Q. And he was appointed by you back in 2001 or '02 correct?
- A. Yes, I think it was 2002. It has been a while.

(Tr. at 250-251.)

By all accounts, Manowski was the Carpenters' Steward. Accordingly, the exceptions of the General Counsel and the Carpenters should be disregarded and the decision of the ALJ should be adopted by the Board.

2. <u>Manowski's duties as steward included policing the alleged exclusive representation agreement.</u>

Next, General Counsel and the Carpenters argue that even if Manowski was a steward (which he clearly was) his knowledge should not be imputed to the union because his agency relationship did not extend to policing the contract. (GC Brief at 23-24; Carp. Brief at 13-15.) Dhein's testimony flatly refutes this argument. With regard to the scope of Manowski's duties as Steward, Dhein testified that it was Manowski's responsibility to bring it to the union's attention if there is someone within the shop doing work that may be carpenters' work:

- Q. Isn't one of your primary functions to make sure that if someone is in your shop doing your work that you that you think is your work that you "red flag" that and bring it to the company's attention?
- A. Well, that would...[objection, overruled]...The answer to that question, yah, I would have thought that Mike Manowski would have reported that to me but he has been pretty derelict in his duties.
- Q. A couple of his duties included, as you would expect, reporting just that very kind of thing, correct?
- A. Yes, yes.
- Q. You have relied upon him to report to you, correct?
- A. Well, he hasn't been very reliable.
- Q. I understand that, but you in your job function, you have known that you have to monitor the shop, correct, like every other shop you have. I mean, it's no different, right?
- A. Yes, sir.
- Q. Okay. And to do that, you appoint a steward, correct?
- A. Yes, sir.

- Q. Just like Mike Manowski, correct?
- A. Yes, sir.
- Q. And you would rely on him to report to you things such as people doing your work who are not members, correct?
- A. You would think so, yes.
- Q. Well that is the system that you have put in place, correct?
- A. Yes, sir.
- Q. That is the system you rely upon, correct?
- A. Yes.

(Tr. at 251-253.)

The fact that Manowski did not perform very well as the union's eyes and ears on the shop floor does not strip him of his standing as steward, nor does it absolve the union of the consequences of the agency relationship. Courier-Journal, 342 NLRB 1093, 1103 (2004) ("Whether employees' knowledge is imputed to their bargaining representative for purposes of determining when the 10(b) limitations period commences depends upon the factual context."); Goski Trucking Corp., 325 NLRB 1032, 1032 (1998) (steward's knowledge was imputed to union). Notably, none of the precedent cited by the General Counsel or Carpenters even remotely suggests that a steward's knowledge is not imputed to a union simply because the steward was negligent in performing his stewardship, nor is UKS aware of any precedent supporting such an argument. In fact, substantial precedent holds that the knowledge of the agent is generally imputed to the principal, regardless of whether the agent was negligent in performance of his duties. See 3 Am. Jur. 2d, Agency, P. 635, §273; 3 C.J.S. Agency §262, p. 194 ("The knowledge of an agent may be imputed to a principle irrespective of whether the agency is founded on express or implied authority."); Johnson v. Assoc. Seed Growers, Inc., 240 Wis. 278, 3 N.W.2d 332 (1942) (noting the general rule is that a principal is chargeable with and bound by such knowledge and notice as his agent received in relations to a matter over which the authority of the agent extended.)

It is indisputable that Manowski knew, well before February, 2008, that there was a sizeable crew of laborers performing marine industry production work in the bays next to him. Manowski testified (on direct examination by General Counsel):

- Q. [W]hen did you first notice Laborers working in the shop?
- A. Probably June or July, 2006.
- Q. Six?
- A. Or 2007. Sorry.
- Q. Okay. And at the time they began working what work were they performing?
- A. They were working on Marinette Marine panels.
- Q. All right. Did you observe them working?
- A. Yes.

(Tr. at 83-84.)

Indeed, Manowski went on to describe specific job functions that he observed the laborers performing in 2007 (the same functions over which the carpenters' claim exclusive shop jurisdiction). (Tr. at 84-85.) Manowski testified:

- Q. And again in the time frame I'm looking for or looking at is around you said June, 2007 you saw Laborers perform that type of work?
- A. Yes.

(Tr. at 85.)

Thus, it is clear beyond question that Manowski had notice of the laborers' performance of duties that allegedly belonged to the millwrights far outside the 10(b) period. Moreover, it is equally clear that Manowski was a steward of the union during the relevant period, and that his stewardship responsibilities included policing the shop floor and reporting if other workers were performing millwright work. The fact that Manowski was "derelict in his duty" does not operate to toll the statute of

limitations and the exceptions of the General Counsel and the Carpenters are utterly unsupported and should be disregarded.

II. THE CARPENTERS' CLAIM THAT THEY ARE THE 9(A) REPRESENTATIVE OF SHOP EMPLOYEES IS NOT SUPPORTED BY THE EVIDENCE.

Notably, the ALJ never reached the question of whether the Carpenters had a right to exclusively represent the employees performing marine industry work at UKS because he correctly found the Charge untimely under 10(b). However, should the Board choose to address the representation claim it should find that the charge is fatally flawed and unsupported by any interpretation of the evidence.

General Counsel argues that three documents "reaffirm" the status of the Carpenters as the 9(a) representative of "the shop employees," namely: (1) the Carpenters' Field Agreement (Jt. Ex. 3); (2) a Memorandum of Agreement adopting the Working Agreement Northern Wisconsin Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America and Associated General Contractors of Wisconsin, Inc. (hereinafter "Carpenters Working Agreement" (GC Rej. Ex. 22.); and (3) an Addendum to the Working Agreement (hereinafter "Carpenters Shop Agreement.")

It is undisputed that no Board election has ever been held to determine whether the Carpenters ever represented a majority of UKS shop employees. It is further undisputed that the Carpenters has never made a showing of signed authorization cards to UKS (or any predecessor thereof). (Tr. at 386.) Therefore, the undisputed record includes no evidence whatsoever showing that a majority of UKS shop workers ever desired exclusive representation by the Carpenters. Under these circumstances, General Counsel and the Carpenters have a high hurdle to clear to present clear, unequivocal evidence of a 9(a) relationship and majority status. H.Y. Floors & Gameline Painting, 331 NLRB 304 (2000) (holding that to establish voluntary recognition in the construction industry pursuant to 9(a) the Board requires evidence that the union (1) unequivocally demanded recognition as the employees' 9(a) representative; and (2) that the employer unequivocally accepted it as such); J&R Tile, 291 NLRB 1034

(1988) (proof of 9(a) status requires evidence "that the union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such."); Brannan Sand, 289 NLRB 977 (1988) (9(a) status can be "based upon contemporaneous showing of union support among a majority of the employees in a bargaining unit.")

A cursory review of the record shows that General Counsel and the Carpenters have not come close to satisfying their burden to produce "clear" and "unequivocal" evidence of 9(a) status. Tellingly, General Counsel and the Carpenters make no attempt whatsoever to show that a majority of UKS shop employees desire the Carpenters as their representative. Instead, they rely upon a wildly distorted interpretation of the Voluntary Recognition Agreement attached to the Carpenters Field Agreement. Such arguments cannot succeed in light of Board precedent and longstanding labor policy upholding the importance of employees' free choice of representative. J&R Tile, 291 NLRB 1034 (1988); Decision, Inc., 166 NLRB 464 (1967).

Because of the importance of employees' freedom to select their representative, contract language, standing alone, cannot establish 9(a) recognition. To allow contract language to substitute for a valid showing of majority support would "create[] an opportunity for construction companies and unions to circumvent...[majority showing requirements]." Nova Plumbing v. NLRB, 172 LRRM 2700 (CA D.C. 2003), enf. den. 336 NLRB No. 61 (2001); Sheet Metal Workers Local 19 v. Herre Bros, 201 F.3d 231 (3rd Cir. 1999) (contract language not dispositive); NLRB v. Triple Maintenance, 219 F.3d 1147 (10th Cir. 2000) (same). Because the General Counsel and the Carpenters present no proof aside from contract language, it is axiomatic that they cannot establish 9(a) status.

A. The Voluntary Recognition Agreement Does Not Apply To United Kiser's Shop Employees.

It is immediately apparent that the only contract between the Carpenters and UKS that even arguably contains unequivocal 9(a) language is the Carpenters Voluntary Recognition Agreement (Jt. Ex. 3.) Importantly, however, the Carpenters Voluntary Recognition Agreement governs a defined, limited

geographical jurisdiction that does not include Dickinson County, where UKS' shop is located. (Id., pages 35-37.) This agreement clearly does not include UKS' shop, as it is limited to Wisconsin, plus a portion of Menomonee, Michigan.

The union's limited geographical jurisdiction during the relevant period is confirmed by James E. Moore, Executive Secretary - Treasurer of the Carpenters Union in his June 3, 2008 letter to "All Signatory Contractors," including an "Enclosure on state maps and accompanied county description of contractual area," from which Dickinson County, Michigan is clearly excluded. (R. Ex. 5.) Jeff Kiser also testified, without contradiction, that the Company has never been able to use Dhein's local millwrights exclusively for work in Norway, Michigan because of the limited jurisdiction of the agreement. (Tr. at 389-390.)

Despite the glaringly obvious limit of the contract's jurisdictional reach, General Counsel and the Carpenters nonetheless argue that such contract meets the Board's requirements for "clear" and "unequivocal" evidence of the Carpenters' alleged 9(a) status in the shop. In forcing such argument, General Counsel relies upon his excluded Exhibit 22, by which he seeks to unilaterally expand the scope of the Carpenters' Field Agreement.

Significantly, even if the ALJ had accepted the irrelevant exhibit, it does not come close to providing unequivocal evidence of 9(a) status, nor does it constitute of majority support of any degree. More importantly, the outdated exhibit is superseded by the union's own contemporaneous statement of its jurisdiction in 2008. (R. Ex. 5.) Equally important, uncontroverted witness testimony, including that of Dhein, shows that the Carpenters have never represented "all shop employees" and that a contingent of laborers has always been present in the shop. (Tr. at 232-233, 385-386.) Thus, the practice of the parties shows that the Carpenters have never enjoyed exclusive representation of all shop employees, despite the language in the rejected exhibits. Accordingly, the exceptions of the General Counsel and Carpenters must be disregarded.

B. The Carpenters Shop Agreement Does Not Establish The Carpenters Alleged 9(a) Status.

The Carpenters Shop Agreement contains no recognition language. (Jt. Ex. 4.) The mere listing of job titles, without more, is no substitute for unequivocal contract language evincing an intention to create a 9(a) relationship, and it is a very far cry from an acknowledgement of majority support. More importantly, the record clearly shows that the Carpenters have never been the sole representative of shop employees and UKS has never, in practice, recognized it as such. (Tr. at 385 (Kiser Testimony); 276 (Keith Testimony), 288, 385 (Spinnato Testimony); R. Exs. 3, 4.)

Furthermore, Dhein himself testified that there were laborers in the shop from the inception of UKS. Dhein testified:

- Q. [y]ou were fully aware from January 1 forward that there were Laborers Union members working in the shop...is that correct?
- A. Okay.
- ALJ: Did you know there were Laborers at United Kiser based upon your visits to the facility in 2006?
- A. Yes.

(Tr. at 232-233.)

Compelling evidence refutes the General Counsel's distorted argument that contract language vests the Carpenters with exclusive 9(a) status. Accordingly, the exceptions of the General Counsel and Carpenters must be disregarded.

CONCLUSION

Respondent Union met its burden to show that the charge was untimely and is therefore barred by Section 10(b). Additionally, no evidence whatsoever supports the Carpenters' claim to 9(a) status.

Therefore, the exceptions of the General Counsel and the Carpenters should be disregarded and the decision of the ALJ adopted as that of the Board.

Date: October 22, 2009

Respectfully submitted,

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UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRTIETH REGION

UNITED KISER SERVICES, LLC

Honorable Bruce D. Rosenstein Administrative Law Judge

and

CONSTRUCTION AND GENERAL LABORERS' UNION, LOCAL 1329

Case Nos.

30-CA-18129 30-CB-05352

and

NORTHERN WISCONSIN REGIONAL COUNCIL OF CARPENTERS

CERTIFICATE OF SERVICE

On October 22, 2009, Elizabeth A. Smeal, served a copy of Respondent Union, Construction and General Laborers' Union, Local 1329's Response to General Counsel's and Northern Wisconsin Regional Council of Carpenters' Exceptions to the Administrative Law Judge's Decision by placing said document in an envelope properly addressed as stated below:

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Date: October 22, 2009

Elizabeth A. Smeal